

ORIGINAL



0000031409

BEFORE THE ARIZONA CORPORATION C
RECEIVED

COMMISSIONERS

JEFF HATCH-MILLER, Chairman

WILLIAM A. MUNDELL

MARC SPITZER

MIKE GLEASON

KRISTIN K. MAYES

2005 SEP 28 P 4: 29

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE APPLICATION OF
MCIMETRO ACCESS TRANSMISSION
SERVICES, LLC, FOR APPROVAL OF AN
AMENDMENT FOR ELIMINATION OF UNE-P
AND IMPLEMENTATION OF BATCH HOT CUT
PROCESS AND QPP MASTER SERVICE
AGREEMENT.

DOCKET NO. T-01051B-04-0540

DOCKET NO. T-03574A-04-0540

QWEST CORPORATION'S APPLICATION FOR REHEARING

I. INTRODUCTION AND SUMMARY

Qwest Corporation ("Qwest") submits this application for rehearing relating to the Commission's Order of September 9, 2005 ("Commission Order")¹ that adopted the Administrative Law Judge's Order ("ALJ Order"), as amended, issued July 15, 2005. The Commission Order requiring Qwest to file for approval the Qwest Platform Plus Agreement ("QPP Agreement") between Qwest and MCIMetro ("MCI") conflicts with or violates the filing standard in Section 252(a)(1) of the Telecommunications Act of 1996 ("the Act"), the FCC's *Declaratory Order* implementing that standard, the recent order of the Montana federal district court that interprets and applies the Section 252 filing requirement, the order of the Minnesota Public Utilities Commission involving the QPP Agreement, and the Congressionally-mandated

¹ *In the Matter of the Application of MCIMetro Access Transmission Services, LLC, for Approval of an Amendment for Elimination of UNE-P and Implementation of Batch Hot Cut Process and QPP Matter Service Agreement*, Docket Nos. T-0105 1B-04-0540 and T-03574A-04-0540, Decision No. 68116, Order Denying Motion to Dismiss (Ariz. Commission Sept. 9, 2005) ("Commission Order").

1 deregulatory policies underlying the Act. The Commission should reconsider the Commission
2 Order and grant Qwest's Motion to Dismiss the Application for Review of Negotiated
3 Commercial Agreement.

4 Qwest's briefs in support of its exceptions to the ALJ's Order explain in detail why the
5 Commission is without authority to require Qwest and MCI to file the QPP Agreement for review
6 and approval. Qwest will not repeat the arguments in those briefs in full and, instead,
7 incorporates them by reference.

8 At the open meeting on September 7, 2005, the Commission supported its decision to
9 adopt the ALJ Order by concluding that the Order is largely consistent with the approach
10 followed by the Minnesota Commission.² In addition, the Commission determined that the recent
11 rulings by the Montana federal court interpreting and applying the Section 252 filing standard³ do
12 not apply because the court was addressing an agreement relating to line sharing, not the QPP
13 Agreement. Both conclusions are incorrect.

14 First, the Commission concluded that like the Minnesota order, the ALJ Order establishes
15 a two-step process under which Commission Staff will review agreements in the first instance to
16 determine if they are subject to the Commission's review and approval. This screening process,
17 the Commission appeared to determine, establishes that there are no meaningful differences
18 between the ALJ Order and the Minnesota Order. However, this conclusion fails to recognize a
19 fundamental difference between the Minnesota Order and the ALJ Order that renders the former
20 lawful and the latter unlawful.

21 Critically, unlike the ALJ Order, the Minnesota Order adopts the filing standard required
22 by Section 252(a)(1), the *Declaratory Order*, and the decision of the Montana federal court.

23
24
25 ² *Qwest Corporation and MCI Metro Access Transmission Services Amendment to Interconnection Agreement*, Order
26 Releasing Agreement from Review, Minnesota Public Utilities Commission, Docket No. P-5321, 421/IC-04-1178
(May 18, 2005) ("Minnesota Order").

27 ³ *Qwest v. Montana Public Service Commission*, CV-04-053-H-CSO, Order on Qwest's Motion for Judgment on
28 Appeal (D. Mont. June 9, 2005) ("Montana Order"). A copy of the Montana Order is attached as Exhibit B to
Qwest's opening brief in support of its exceptions to the ALJ Order.

1 Thus, while the Minnesota Commission will determine in the first instance whether an agreement
2 is an interconnection agreement subject to review and approval, it will do so by applying the
3 binding standard set forth in the *Declaratory Order* and determining whether the agreement
4 contains ongoing obligations to provide services under Section 251(b) or (c). The Minnesota
5 Commission recognizes that if an agreement does not include obligations under these subsections,
6 it is not within Section 252's filing requirement.⁴

7 By contrast, the Commission Order does not apply the *Declaratory Order's* filing standard
8 correctly. Instead of focusing on whether an agreement contains ongoing obligations under
9 Section 251(b) or (c), the Order gives the Commission almost unlimited discretion to decide that
10 an agreement must be filed for review and approval⁵ by concluding incorrectly that the FCC only
11 intended to exempt from the filing and approval process agreements relating to settlements of
12 billing disputes, forms that CLECs use to order services, and agreements with bankrupt
13 competitors.⁶ As an example of the breadth of the standard resulting from the Commission Order,
14 the rationale used to justify the standard could lead to the conclusion that any agreement not
15 within these categories -- an agreement between an ILEC and a CLEC for purchase of a truck, for
16 example -- is an interconnection agreement that must be filed for review and approval because it
17 does not fall within one of the enumerated "exceptions." Thus, while the Commission might
18 engage in the act of reviewing agreements to determine if they are subject to the filing
19 requirement, the Commission's evaluations under the Order will bear no resemblance to the
20 limited, focused analysis required by the *Declaratory Order*, the Minnesota Order, and the
21 decision of the Montana federal court.

22 Second, the Commission's rejection of the Montana federal court's rulings rests on an
23

24
25 ⁴ Minnesota Order at 2-3.

26 ⁵ During the open meeting, the ALJ and the Commission described Commission Staff as having responsibility for
27 conducting reviews of agreements to determine if they are subject to approval by the Commission. However, that
function is within the exclusive province of the Commission itself and cannot properly be delegated to Staff.

28 ⁶ Commission Order at ¶ 7 and n.11.

1 artificial distinction. The Commission reasoned during the open meeting that the Montana
2 decision is distinguishable from this case because it involved an agreement relating to the
3 network element known as line sharing, not the switching and shared transport network elements
4 that are the subject of the QPP Agreement. However, the relevance of the Montana decision is
5 found in the federal court's ruling that the filing standard in the *Declaratory Order* -- agreements
6 containing ongoing obligations under Sections 251(b) and (c) -- is consistent with Section
7 252(a)(1) and is binding on state commissions.⁷ Under that standard, the line sharing agreement
8 at issue was not subject to the filing requirement, since line sharing is not an element that ILECs
9 provide pursuant to Section 251(b) or (c).

10 The rulings of the Montana court apply with equal force and mandate the same result in
11 this case. Just as ILECs have no obligation to provide the line sharing element under Section 251,
12 they have no obligation under that section to provide the switching and transport elements that are
13 the subject of the QPP Agreement. Accordingly, like the line sharing agreement that the Montana
14 court considered, the QPP agreement is not subject to the Act's filing requirement. The fact that
15 the Montana decision involved a different network element than those addressed by the QPP
16 Agreement is a distinction without a difference. The key point is that neither the Montana case
17 nor this case involved an agreement for the provision of an unbundled network element under
18 Section 251 or for the provision of any service under that section; it is that common fact that
19 makes the Montana case indistinguishable from this case.

20 For these reasons and those summarized below, the Commission should reverse its
21 decision to adopt the ALJ Order.

22
23
24
25
26
27
28 ⁷ Montana Order at 14-16.

II. ARGUMENT

A. The Requirement For Carriers To File Agreements With State Commissions For Review And Approval Applies Only To Agreements Involving Ongoing Obligations Under Sections 251(b) or (c).

The Commission Order is legally flawed because it fails to adopt and apply the filing standard established by the statutory language in Section 252, the *Declaratory Order*, the Montana federal court decision, and the Minnesota Order. These statutory provisions and orders establish that the *only* agreements carriers must file for approval are agreements between an ILEC and a CLEC that create ongoing obligations relating to the duties imposed by Sections 251(b) and (c).⁸ Only agreements containing obligations relating to a Section 251(b) or (c) service constitute an "interconnection agreement" within the meaning of Section 252. The reference in the Commission Order to Section 252(e)'s directive to file "any interconnection agreement" begs the question of what agreements fall within the term "interconnection agreement," which is a term of art defined by the FCC in the *Declaratory Order*. As the Montana court and the Minnesota Commission ruled, the use of this term in Section 252(e) refers to the agreements addressed in Section 252(a)(1), which are agreements containing ongoing obligations relating to Section 251(b) and (c).⁹

In the *Declaratory Order*, the FCC defined the agreements that must be submitted to state commission for review and approval as those that

Create[] an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, *unbundled network elements*, or

⁸ Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, ¶ 8, n.26 (Oct. 4, 2002) ("*Declaratory Order*").

⁹ Montana Order at 14-15; Minnesota Order at 2-3.

1 collocation.¹⁰

2 The services listed that trigger a Section 252 filing obligation *track precisely and sequentially*
3 *with the list of services that LECs and CLECs must provide under Section 251(b) and (c), and*
4 *no others*. To be even more precise, the FCC followed this statement through a footnote,
5 conclusively ruling that there is no requirement that an ILEC file *all* agreements with CLECs:

6 We . . . disagree with the parties that advocate the filing of *all* agreements between
7 an incumbent LEC and a requesting carrier Instead, we find that *only* those
8 agreements that contain an *ongoing obligation relating to section 251(b)* must be
9 filed under section 252(a)(1).¹¹

10 Consistent with the Act's de-regulatory purpose, there is no requirement for carriers to file
11 and seek regulatory approval of agreements that do not address the Section 251(b) and (c)
12 obligations. Indeed, in discussing this standard in the *Declaratory Order*, the FCC emphasized
13 that it is consistent with the Act's deregulatory goals, stating that the standard promotes "the
14 statutory balance between the rights of competitive LECs to obtain interconnection terms . . . and
15 removing unnecessary regulatory impediments to commercial relations between incumbent and
16 competitive LECs."¹² By requiring Qwest and MCI to submit the Agreement for approval, the
17 Commission Order continues to impose "unnecessary regulatory impediments" on commercial
18 relations involving switching and transport despite the FCC's removal of those elements from the
19 Section 251/252 regulatory framework and its determination that application of that framework is
20 no longer necessary to competition.

21
22 It is undisputed that Qwest has no obligation under Section 251(c)(3) to provide the
23 switching and transport network elements that comprise QPP. Section 251(d)(2) provides that an
24

25
26 ¹⁰ *Declaratory Order* ¶ 8 (italics in original).

27 ¹¹ *Id.* n.26 (italics in original; underlining added).

28 ¹² *Id.* at ¶ 8.

1 ILEC's obligation to lease portions of its network exists *only* where the FCC finds that "the
2 failure to provide access to such network elements *would impair* the ability of the
3 telecommunications carrier seeking access to provide the services that it seeks to offer."¹³ Thus,
4 unless the FCC specifically determines that the failure to provide a specific element *would impair*
5 the ability of competitors to provide the services they seek to offer, the ILEC has no Section
6 251(c)(3) duty to provide the particular element. In *USTA II*, the U.S. Court of Appeals for the
7 D.C. Circuit vacated the FCC rules that would have required ILECs to continue to provide
8 switching and shared transport as UNEs under Section 251(c)(3).¹⁴ On remand, the FCC,
9 consistent with *USTA II*, expressly found that switching and shared transport are no longer
10 required UNEs.¹⁵ Thus, ILECs are no longer required to provide switching and shared transport
11 as UNEs under Section 251(c)(3).

12 It is the absence of any ILEC obligation to provide switching or shared transport as a UNE
13 under Section 252(c)(3) that, contrary to the Commission's conclusion, makes this case
14 indistinguishable from the Montana case discussed above. In the *Triennial Review Order*, the
15 FCC determined that CLECs are no longer impaired without access to line sharing and,
16 accordingly, removed that network element from the UNEs that ILECs are required to provide
17 under Section 252(c)(3).¹⁶ That determination led directly to the Montana court's holding that the
18 line sharing agreement between Qwest and another carrier did not have to be filed for commission
19 review and approval: "Because line sharing . . . is not an element or service that must be provided
20 under section 251, there is no obligation to submit the [agreement] to the [Montana] PSC for
21

22
23 ¹³ 47 U.S.C. § 251(d)(2) (emphasis added).

24 ¹⁴ *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568, 573, 595 (D.C. Cir. 2004) ("*USTA II*").

25 ¹⁵ Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local*
26 *Exchange Carriers*, Dkt. Nos. WC 04-313/CC 01-338, FCC 04-290, 2005 WL 289015 at ¶ 199 (February 4, 2005)
27 ("*TRRO*").

28 ¹⁶ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of*
the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, ¶¶ 255-63
(2003) ("*TRO*").

1 approval under section 252."¹⁷ Here, just as with the line sharing element at issue in the Montana
2 case, the network elements in the QPP Agreement – switching and shared transport – have been
3 removed from the UNEs that ILECs are required to provide under Section 252. The fact that the
4 network elements at issue in both cases have been removed from Section 251 is what makes this
5 case indistinguishable from the Montana case; it is immaterial that the two cases involved
6 different non-251 network elements.

7 The Commission Order improperly expands the scope of the filing requirement by
8 requiring carriers to file for review and approval agreements between ILECs and CLECs that do
9 not contain terms and conditions for Section 251 services. The absence of any obligation under
10 Section 251(c)(3) to provide switching or transport removes the QPP Agreement from the
11 categories of agreements that carriers must file with state commissions for review and approval.

12 **B. The Order Incorrectly Construes And Applies The FCC's *Declaratory Order*.**

13 After ruling in the *Declaratory Order* that carriers are required to file only those
14 agreements containing ongoing obligations under Sections 251(b) and (c), the FCC declined to
15 provide an exhaustive list of the types of agreements that meet or fall outside that standard. Thus,
16 the FCC stated that while it was defining "the basic class of agreements that should be filed," it
17 was not "address[ing] all the possible hypothetical situations presented in the record before us."¹⁸
18 In the *Declaratory Order*, the FCC did address whether a small number of specific agreements at
19 issue in another proceeding were within the Section 252 filing requirement. Applying the
20 standard of an "ongoing obligation relating to section 251(b) or (c)," the FCC concluded that
21 carriers are not required to file settlement agreements relating to "backward-looking" billing
22 disputes, order and contract forms that CLECs submit to an ILEC to request service, or certain
23 agreements with bankrupt competitors entered into at the direction of a bankruptcy court or
24

25
26
27 ¹⁷ Montana Order at 14.

28 ¹⁸ Declaratory Order at ¶¶ 10, 11.

1 trustee.¹⁹

2 Although the FCC expressly stated that it was not providing an exhaustive list of the types
3 of agreements that do or do not meet the Section 252 filing requirement, the Commission Order
4 nevertheless concludes incorrectly that the three types of agreements the FCC specifically
5 addressed comprise an exhaustive list of the agreements that carriers are not required to file.
6 Commission Order at ¶ 7 and n.10. Because the QPP Agreement is not within any of these
7 "exceptions" to the filing requirement, the Order concludes, it must be filed for review and
8 approval. *Id.*

9 The legal error of this conclusion is demonstrated not only by the FCC's very clear
10 statement that it was not providing a complete list of agreements that fall outside the filing
11 requirement, but also by the analysis that led the FCC to the conclusions it reached relating to the
12 small number of agreements it addressed. Significantly, the FCC's analysis of those agreements
13 focused on whether they involved any ongoing obligations relating to Sections 251(b) and (c).
14 For example, while the Commission Order states that the FCC exempted dispute resolution and
15 escalation clauses from the filing requirement (Order at note 10), that is incorrect. Instead, the
16 FCC ruled that "agreements addressing dispute resolution and escalation provisions *relating to*
17 *the obligations set forth in sections 251(b) and (c)* are appropriately deemed interconnection
18 agreements."²⁰ Similarly, while finding that settlement agreements involving "backward-looking"
19 billing disputes are not subject to the filing requirement, the FCC ruled that "a settlement
20 agreement that contains an *ongoing obligation relating to section 251(b) or (c)* must be filed
21 under section 252(a)(1)."²¹

22 Rather than supporting the Commission Order, as the Commission concludes, these
23 examples in the *Declaratory Order* demonstrate the Order's invalidity and confirm that in
24

25
26 ¹⁹ *Id.* at ¶¶ 12-14.

27 ²⁰ *Id.* at ¶ 9 (emphasis added).

28 ²¹ *Id.* at ¶ 12 (emphasis added).

1 determining whether an agreement must be submitted to a state commission for review and
2 approval, a state commission must first analyze whether the agreement contains any ongoing
3 obligations under Sections 251(b) or (c). Because the Commission Order does not include that
4 analysis, it is unlawful.

5 The Commission Order similarly misinterprets the FCC's statement in the *Declaratory*
6 *Order* that "state commissions are well positioned to decide on a case-by-case basis whether a
7 particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it
8 should be approved or rejected." Commission Order at ¶ 5 (quoting *Declaratory Order* at ¶ 10).
9 According to the Order, a ruling that the QPP Agreement does not have to be filed for review and
10 approval "would unduly restrict the responsibilities of state commissions to determine 'in the first
11 instance' whether agreements between incumbent LECs and requesting carriers should be
12 approved." Commission Order at ¶ 8.

13 However, the *Declaratory Order* shows that the language the Commission Order cites was
14 intended to establish only that a state commission should conduct a review "in the first instance"
15 to determine whether an agreement is an interconnection agreement that is subject to the
16 commission's review and approval authority under Section 252. In other words, as the Minnesota
17 Commission ruled, the first step in the process is for a commission to determine if an agreement
18 is an "interconnection agreement." Only if the commission concludes based on that review that
19 the agreement meets the FCC's definition of an interconnection agreement – that it contains
20 ongoing obligations relating to Sections 251(b) and (c) – may the commission may proceed to the
21 second step and review the agreement for approval. Under the Commission Order, the first step
22 in this process is effectively eliminated, as the Commission or Staff does not review an agreement
23 for Section 251(b) or (c) obligations. This outcome violates the *Declaratory Order*, since it will
24 result in the Commission exercising approval authority over agreements that do not contain
25 Section 251(b) or (c) obligations.
26
27
28

1 **C. By The Express Terms Of Section 252(a), The Filing Requirement In That**
2 **Section Does Not Apply To The QPP Agreement.**

3 The Commission's conclusion that "the QPP Agreement is clearly a negotiated agreement
4 within the meaning of section 252(a)(1)" (Commission Order at ¶ 11) is both legally and factually
5 incorrect.

6 Section 252(a)(1) provides:

7 Upon receiving a request for interconnection, services, or network
8 elements *pursuant to section 251 of this title*, an incumbent local
9 exchange carrier may negotiate and enter into a binding agreement
10 with the requesting telecommunications carrier or carriers without
11 regard to the standards set forth in subsections (b) and (c) of
12 section 251 of this title. The agreement shall include a detailed
13 schedule of itemized charges for interconnection and each service
14 or network element included in the agreement. *The agreement . . .*
15 *shall be submitted to the State commission under subsection (e) of*
16 *this section.*²²

17 The introductory clause – "Upon receiving a request for interconnection, services, or network
18 elements *pursuant to section 251 of this title*" – makes clear that everything that follows in that
19 sentence must be read in the context of services required by Section 251. While lacking any
20 analysis of this language, the Commission Order implicitly treats the introductory phrase of
21 Section 252(a)(1) as though it does not exist in violation of the requirement to construe statutes
22 "to give every word some operative effect."²³

23 _____
24
25 ²² 47 U.S.C. § 252(a)(1) (emphasis added).

26 ²³ *Cooper Industries v. Aviall Services*, 125 S.Ct. 577, 584 (2004) (the "settled rule" is "that we must, if possible,
27 construe a statute to give every word some operative effect"); *United States v. Tsosie*, 376 F.3d 1210, 1217 (10th Cir.
28 2004) ("we are also guided by the traditional canon of statutory construction that courts should avoid statutory
interpretations which render provisions superfluous"); *Foutz v. City of South Jordan*, 100 P.3d 1171, 1174 (Utah
2004) quoting *Perrine v. Kennecott Mining Corp.* 911 P.2d 1290, 1292 (Utah 1996) ("We strive to construe statutes
in a manner that renders 'all parts thereof relevant and meaningful.'").

1 The Agreement itself also contradicts the Commission Order's finding that the Agreement
2 is a negotiated agreement within the meaning of Section 252(a)(1). It plainly states both Qwest's
3 and MCI's intent and agreement that Section 271, not Section 252(a)(1) is the source of the
4 Agreement: "This Agreement is offered by Qwest in accordance with Section 271 of the Act."²⁴

5
6 **D. The Commission Order Concludes Incorrectly That The QPP Agreement Is**
7 **Integrated With The Qwest/MCI Interconnection Agreement.**

8 The Commission Order concludes erroneously that the QPP Agreement and the
9 Qwest/MCI amendment to their Section 252 interconnection agreement are "clearly integrated
10 agreements that are not severable." Commission Order at ¶ 9.

11 It has long been established in Arizona and elsewhere that in reviewing and interpreting
12 contracts, it is essential "to effectuate the parties' intent, giving effect to the contract in its
13 entirety."²⁵ The intent of contracting parties should be determined by "consider[ing] the language
14 of the contract in view of the surrounding circumstances."²⁶ Here, the QPP Agreement itself
15 establishes that Qwest and MCI intended to enter into separate and independent agreements. The
16 Agreement's integration clause states that the Agreement "constitutes the full and entire
17 understanding and agreement between the Parties" and expressly provides that nothing in the
18 Agreement "is intended by the parties to amend, alter, or otherwise modify" the terms and
19 conditions of the ICA.²⁷ Indeed, the QPP Agreement and the ICA Amendment were drafted in
20 strict conformity with the FCC's Section 252 filing standard. That is, all of the terms setting rates
21 or other conditions for non-Section 251 services are contained in the QPP Agreement, and all of
22

23
24 ²⁴ QPP Agreement at ¶ 26; *see also id.* ¶ 4.3.

25 ²⁵ *Potter v. U.S. Specialty Insurance Co.*, 98 P.3d 557, 559 (Ariz. Ct. App. 2004).

26 ²⁶ *Id.*; *see also Clark v. Levy*, 220 P. 232, 234 (Ariz. 1923) ("The question as to whether several instruments
27 concerning the same subject-matter should be construed as constituting but one transaction is always influenced by
the surrounding facts and circumstances and each case is largely controlled by its own peculiar facts.").

28 ²⁷ *See* QPP Agreement at ¶ 33.

1 the rates and other terms for Section 251 services are set forth in the ICA Amendment. The
2 parties set forth these terms and conditions in separate agreements precisely because they
3 intended and desired to have independent, severable agreements. By concluding that the
4 agreements are integrated, the Commission Order ignores the parties' plain contractual intent in
5 violation of a basic tenet of contract construction.

6 The Commission Order does not include any analysis of the parties' intent, which is
7 essential to a determination of whether the agreements are integrated or severable. Instead, the
8 Order relies on inaccurate inferences drawn from isolated provisions in the QPP Agreement. For
9 example, the Order relies on the fact that if the rate for the unbundled loop in the ICA changes,
10 the rate for the QPP service will change. Commission Order at ¶ 9. But this analysis misses the
11 point. The relevant question is whether the QPP Agreement contains rates, terms and conditions
12 for the provisioning of Section 251 services. Loops serving mass market customers currently are
13 Section 251 services, and, accordingly, all rates, terms and conditions relating to loops must be
14 contained in a Section 252 agreement. Qwest and MCI have placed each term governing loops in
15 their interconnection agreement on file with this Commission. The Commission Order does not
16 identify a single term or provision in the QPP Agreement itself that reflects the loop rates, and,
17 indeed, there are none. The fact that the QPP rates may change if the loop rate changes does not
18 affect the rates for loops set by the Commission. Absent a finding that the QPP Agreement
19 contains terms for provisioning a Section 251 service, the Section 252 filing requirement does not
20 apply.

21 **E. The Commission Order Does Not Recognize The Critical Legal Distinctions**
22 **Between Network Elements Provided Under Section 271 And Unbundled**
23 **Network Elements Provided Under Section 251.**

24 As discussed above, the switching and shared transport elements that comprise QPP
25 indisputably are not provided pursuant to any ongoing obligation relating to either Section 251(b)
26 or (c) and, therefore, providing them cannot trigger the Section 252 review process.

27 Congress determined that without access to certain ILEC network elements under
28

1 interconnection agreements approved by state commissions, CLECs would be impaired in
2 attempting to compete. Accordingly, ILECs are only required to provide "*unbundled* network
3 elements" under Section 251(c)(3) if there is an FCC finding of impairment and must do so via
4 interconnection agreements that contain cost-based rates. The corollary is that if the FCC
5 determines that CLECs are not impaired without access to certain network elements, ILECs
6 cannot be compelled to provide them under the regulatory scheme imposed by Sections 251 and
7 252. A finding of non-impairment means that CLECs can compete effectively in a market
8 without having access to an element from an ILEC under the highly regulated terms imposed by
9 the Section 251/252 framework.²⁸

10 By requiring submission of the Agreement for approval, the Commission Order
11 improperly applies the regulatory scheme reserved for Section 251 UNEs to Section 271 network
12 elements that Congress expressly exempted from that scheme. The FCC's determinations that
13 CLECs are not impaired without access to switching and shared transport under the terms
14 required by Sections 251 and 252 removed those elements from that regulatory framework (*i.e.*,
15 they are no longer required UNEs). The Commission Order's imposition of an approval process
16 for commercial agreements involving these network elements conflicts directly with the Act's
17 deregulatory objectives and Congress' command in the 1996 Act "to reduce the need for
18 regulation in the presence of competition."²⁹

19
20 **F. The Commission Order Concludes Incorrectly That Commercial Agreements**
21 **Involving Section 271 Elements Will Not Be Subject To Regulatory Review**
22 **Unless State Commissions Assert Jurisdiction.**

23 The Commission Order expressly does not reach the issue of whether "the QPP
24 Agreement must be filed under the Section 271 requirements" (Order at ¶ 12), but it does
25 conclude that "there is no separate review and approval process" for agreements covered by

26
27 ²⁸ *TRRO* at ¶ 29.

28 ²⁹ *TRO* at ¶ 1.

1 Section 271. *Id.* Based on this conclusion, the Order states that it must therefore "be presumed
2 that the review of [Section 271] agreements was intended to occur within the context of the state
3 commissions' Section 252 review process." *Id.* This conclusion is incorrect for two independent
4 reasons.

5 First, the Commission's presumption of state authority over Section 271 agreements
6 ignores the fact that FCC has authority over the terms and conditions under which RBOCs
7 provide Section 271 elements. Sections 201(b) and 202(a) (original provisions of the 1934
8 Communications Act) prohibit carriers from using "charges" and "classifications" or engaging in
9 "practices" that are discriminatory, unjust, or unreasonable, and Section 208 gives the FCC
10 jurisdiction to enforce these prohibitions. The FCC has confirmed that Sections 201(b) and
11 202(a), including 202(a)'s prohibition against discrimination, apply when RBOCs provide
12 network elements under Section 271.³⁰

13 Second, Section 271 does not confer upon state commissions any review and approval or
14 other decision-making authority over section 271 elements. With the passage of the Act, states
15 are not permitted to regulate local telecommunications competition "except by the express leave
16 of Congress."³¹ A plain reading of the Act shows that Congress did not authorize any decision-
17 making role for state commissions in connection with the Section 271 elements that are the
18 subject of the QPP Agreement.³² Section 271 does not grant states decision-making authority of
19 any kind, as evidenced by the fact that the Commission Order fails to identify any provision in
20 that section that gives states authority over Section 271 elements.

21
22
23
24
25
26 ³⁰ See *TRO* at ¶ 663.

27 ³¹ *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001).

28 ³² See *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003)
(state commission not authorized by Section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004).

1 **G. The Commission Order Relies Incorrectly On The Definition Of "Network**
2 **Element" In Section 153 of the Act.**

3 The Commission Order states without explanation that the QPP Agreement "is subject to
4 the Section 252 filing requirements because the agreement's terms specifically address prices to
5 be paid for network elements under the definition set forth in 47 U.S.C. § 153" Commission
6 Order at ¶ 7. Although the Order does not explain this reliance on Section 153, the definition of
7 "network element" contained in that section has no relevance to the analysis of whether the QPP
8 Agreement must be filed for approval under Section 252.

9 Section 153(29) defines a "network element" as follows:

10 The term 'network element' means a facility or equipment used in
11 the provision of telecommunications service. Such term also
12 includes features, functions, and capabilities that are provided by
13 means of such facility or equipment, including subscriber numbers,
14 databases, signaling systems, and information sufficient for billing
15 and collection or used in the transmission, routing, or other
16 provision of telecommunications service."

17 As is apparent from this language, this definition of "network element" is extremely broad. By its
18 terms, it covers network elements an ILEC is not required to provide under Section 251. Because
19 the Section 252 filing requirement is expressly linked to UNEs that ILECs must provide under
20 Section 251 – as distinct from non-251 elements that ILECs provide – the broad definition in
21 Section 153(29) is irrelevant in determining whether an agreement involving network elements
22 must be submitted for review and approval. Indeed, in the *Declaratory Order*, the FCC expressly
23 used the term "unbundled" network element in defining the filing standard and did not use or
24 refer to the definition of "network element" in Section 153(29).³³

25 **H. The Commission Order Relies On An Improper Application Of State Law As**
26

27
28 ³³ *Declaratory Order* at ¶ 8.

A Basis For Imposing The Filing Requirement.

The Commission Order concludes that under the Commission's rules (specifically, A.A.C. R14-2-102, A.A.C. R14-2-1302, and A.A.C. R14-2-1506(A)), the QPP Agreement is an "interconnection agreement" that must be submitted to the Commission for review and approval. Commission Order at ¶ 13. Under this application of the Commission's rules, it is irrelevant whether the QPP Agreement includes any ongoing obligations under Sections 251(b) or (c). It is enough to trigger the state-imposed filing requirement, according to the Order, if an agreement is a "formal agreement between any telecommunications carriers providing or intending to provide telecommunications services in Arizona" Commission Order at ¶ 13 (quoting A.A.C. R14-2-1502). Because this application of the Commission's rules conflicts with the filing standard established by the Act and the *Declaratory Order*, it is unlawful.

In transferring the regulation of local telecommunications from the states to the federal government by passing the 1996 Act, Congress preserved independent state authority only to the extent that authority is exercised in a manner consistent with the Act and federal policies. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section." Likewise, Sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act. These savings clauses thus do not do not give state commissions authority to adopt or enforce under state law rules and regulations that conflict with provisions of the Act, the FCC's rules and orders implementing the Act, or the federal policies underlying the Act.

Here, the filing requirement that the Commission Order attempts to impose under state law clearly conflicts with the FCC's determination that carriers are required to file for approval only agreements containing ongoing obligations under Sections 251(b) and (c). Equally important, the state-imposed requirement conflicts with the federal policy of moving toward a deregulatory, market-driven system, particularly in connection with network elements for which there is no impairment-based unbundling requirement.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED: September 28, 2005

John M. Devaney
Perkins Coie
607 14th St., N.W.
Washington, D.C. 20005-2011
Telephone: (202) 628-6600

Attorneys for Qwest Corporation

1 Original and 13 copies of the foregoing
2 were filed this 28th day of September, 2005 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, AZ 85007

7 Copies of the foregoing were mailed this
8 28th day of September, 2005 to:

9 Thomas F. Dixon
10 MCImetro Access Transmission Services, LLC
11 707 – 17th Street, Suite 4200
12 Denver, CO 80202

Patrick Clisham
AT&T Arizona State Director
320 E. Broadmoor Court
Phoenix, AZ 85022

13 Thomas H. Campbell
14 Michael T. Hallam
15 LEWIS AND ROCA
16 40 N. Central Avenue
17 Phoenix, AZ 85004

Mike Miner
Integra Telecom of Arizona, Inc.
19545 NW Von Neumann Drive, Suite 200
Beaverton, OR 97006

18 Timothy Berg
19 Theresa Dwyer
20 FENNEMORE CRAIG
21 3003 N. Central Avenue, Suite 2600
22 Phoenix, AZ 85012

William Haas
McLeodUSA Telecommunications Services,
Inc.
5400 C Street SW
P.O. Box 3177
Cedar Rapids, IA 52406

23 Joan S. Burke
24 OSBORN MALEDON
25 2929 N. Central Avenue, Suite 2100
26 Phoenix, AZ 85012-2794

Jeffrey J. Walker
Preferred Carrier Services, Inc.
14681 Midway Road, Suite 105
Addison, TX 75001

Mary B. Tribby
AT&T
1875 Lawrence Street, Suite 1053
Denver, CO 80202-1870

Metropolitan Telecommunications of
Arizona, Inc.
44 Wall Street, 14th Floor
New York, NY 10005

Dereck M. Gietzen
Vycera Communications, Inc.
12750 High Bluff Drive, Suite 200
San Diego, CA 92130

John Houghtalin
TelLogic
370 N. Market Street
Denver, CO 80202

1	Granite Telecommunications, LLC	William Levis
2	234 Copeland Street	MCImetro Access Transmission Services
3	Quincy, MA 02169	707 – 17 th Street, Suite 3900
		Denver, CO 80202
4	Robert A. Curtis	Scott Loney
5	Trinsic Communications, Inc.	Bullseye Telecom, Inc.
6	601 S. Harbour Island Boulevard, Suite 2200	25900 Greenfield Road, Suite 330
	Tampa, FL 33602	Oak Park, MI 48237
7	Lisa Lezotte	Ronald Rodemerk
8	CAN Communication Services, Inc.	Global Crossing Local Services, Inc.
9	32991 Hamilton Court	1080 Pittsford Victor Road
	Farmington Hills, MI 48334	Pittsford, NY 14534
10	Donna Beaver	Prince Jenkins
11	The J. Richard Company	DIECA Communications, Inc.
12	4607 E. Molly Lane	2330 Central Expressway
	Cave Creek, AZ 85331	Santa Clara, CA 95050
13	Keith Nussbaum	Todd Meislahn
14	Preferred Long Distance, Inc.	1-800- Reconex, Inc.
15	16830 Ventura Boulevard, Suite 350	2500 Industrial Avenue
	Encino, CA 91436	Hubbard, OR 97032
16	Arthur L. Magee	Gregory Lawhon
17	Budget Phone, Inc.	Ionex Communications North
18	6901 W. 70 th Street	2020 Baltimore
	Shreveport, LA 71149	Kansas City, MO 64108
19	Linda Hunt	Jeff Swickard
20	Lightyear Network Solutions, LLC	Tel West Communications LLC
21	1901 Eastpoint Parkway	P.O. Box 94447
	Louisville, KY 40223	Seattle, WA 98124
22	Steven S. Solbrack	Matt O'Flaherty
23	Popp Telecom, Inc.	NorthStar Telecom, Inc.
24	620 Mendelssohn Avenue N	1101 Hills Road
	Golden Valley, MN 55427	Fremont, NE 68025
25		
26		

1	Jeff Compton	Karen Johnson
2	Telscape Communications, Inc.	Integra Telecom, Inc.
3	606 E. Huntington Drive	19545 NW Von Neumann Drive, Suite 200
4	Monrovia, CA 91016	Beaverton, OR 97706
5	Paul Masters	Paul Riss
6	Ernest Communications, Inc.	New Rochelle Telephone Corporation
7	6475 Jimmy Carter Boulevard, Suite 300	74 South Broadway, Suite 302
8	Norcross, GA 30071	White Plains, NY 10601
9	Dennis Ahlers	Christopher Staton
10	Eschelon Telecom of Arizona, Inc.	PiperTel Communications, LLC
11	730 Second Avenue South, Suite 1200	2100 S. Cherry Street, Suite 230
12	Minneapolis, MN 55402	Denver, CO 80222
13	Debra Waller	Jeff Rhoden
14	CAT Communications International, Inc.	Prime Time Ventures, LLC
15	4142 Melrose Avenue NW	210 W. 8 th Street, Suite 202
16	Roanoke, VA 24017	Medford, OR 97501
17	Christopher K. Kempley, Chief Counsel	Ernest Johnson, Director
18	Legal Division	Utilities Division
19	Arizona Corporation Commission	Arizona Corporation Commission
20	1200 West Washington Street	1200 West Washington Street
21	Phoenix, AZ 85007	Phoenix, AZ 85007
22	National Brands, Inc.	ValuTel Communications, Inc.
23	(aka: Sharenet Communications Company)	Melvin Reams, President
24	Attention Gary J. Joseph	13809 N. Research Blvd., Suite 705
25	4633 West Polk Street	Austin, TX 78750-1246
26	Phoenix, AZ 85043	
	Maureen Scott	
	Legal Division	
	Arizona Corporation Commission	
	1200 West Washington Street	
	Phoenix, AZ 85007	

